No. 10-344

IN THE
Supreme Court of the United States

ALONSO ALVINO HERRERA
Petitioner,
v.

STATE OF OREGON
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF OREGON

AMICUS BRIEF OF LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND ORLEANS PUBLIC DEFENDERS
In Support of Petitioner

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INTERESTS OF *AMICI CURIAE*[1]

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana. LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions and, occasionally, acting as *amicus curiae* in cases where the rights of all are implicated. LACDL is, from time to time, invited by the Louisiana Supreme Court to submit *amicus* briefs in appropriate cases.

The Orleans Public Defenders (OPD) is the largest full-time public defender office in the state of Louisiana. Its staff attorneys represent more than ninety percent of defendants in the Criminal District Court of Orleans Parish, where more than 12,000 new state cases were accepted for prosecution in 2009. Lawyers from the Orleans Public Defenders have represented criminal

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[1] Pursuant to this Court's Rule 37, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified and have consented to the filing of this brief.

defendants in thousands of jury trials since this Court's decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972).

Amici have an interest separate from the Petitioner and Respondent in this case. *Amici* respectfully suggest that this Court consider this case along with the *petition for certiorari* now before the Court and filed in *Barbour v. Louisiana* (10-689), to determine the constitutionality of the non-unanimous jury verdict.

INTRODUCTION

Louisiana and Oregon are the only two states to deny citizens the right to a presumption of innocence until found guilty beyond a reasonable doubt by a unanimous jury. *Amici* have seen, firsthand, that non-unanimous juries work to exclude and silence minority voices, and contribute to rushed and unreliable verdicts. *Amici* represent clients who have been, or imminently stand to be, profoundly injured by Louisiana's non-unanimous jury scheme, and who therefore have a keen interest in this Court's revisiting its fractured determination in *Apodaca*.

Amicus LACDL has filed briefs addressing the non-unanimous jury verdict issues presented to this Court in *Lee v. Louisiana*, no. 07-1523, and *Bowen v. Oregon*, no. 08-1117. In both pleadings, LACDL laid out the sordid history and racist motives that drove the adoption of the non-unanimous jury verdict scheme in Louisiana. *See Lee v. Louisiana*, no. 07-1523, Amicus of LACDL at 6 (noting that "we can appeal to the conscience of the nation, both judicial and legislative and I don't believe that they will take the responsibility of striking down the system which we have reared in order to protect the purity of the ballot box and to perpetuate the supremacy of the Anglo- Saxon race in Louisiana."); *Bowen v. Oregon*, no. 08-1117, *Amicus of LACDL* at 10 (detailing same history).

Those earlier filings are on file in this Court, and LACDL will not recount the entirety of that historical analysis in this brief, but rather will concentrate on the ongoing pragmatic consequences of the non-unanimous rule in Louisiana's courtrooms.

Ultimately, *amici* respectfully suggests that this Court consider, alongside Alonso Herrera's petition, the petition for certiorari now before this Court and filed in *Barbour v. Louisiana* (10-689), involving a Louisiana defendant convicted by a non-unanimous jury. Cases arising from Louisiana squarely present the troubling historical racial origins of non-unanimity[2] and the impact of the non-unanimous jury scheme in silencing minority participation.

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[2] Cf. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) ("Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under Arlington Heights.").

SUMMARY OF THE ARGUMENT

This Court should grant certiorari here or in *Barbour v. Louisiana*, 10-689 (response due December 27, 2010)[3] and overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972).

As noted in the petitions for certiorari in *Herrera* and *Barbour*, the jurisprudential approach taken by the *Apodaca* plurality is out of step with this Court's Sixth Amendment jurisprudence: *Apodaca* focused on the functional role of the jury in contemporary society, while this Court has made clear that Sixth Amendment questions properly turn on the Framers' understanding of the applicable rights.

A*mici,* focus on a separate reason to overrule *Apodaca*. The Louisiana experience with non-unanimous juries highlights deep flaws in *Apodaca*'s fractured reasoning. *Apodaca* was wrongly decided because the plurality's central assumption – that no functional difference exists between juries operating under a unanimity requirement and those operating under a 10-2

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[3] *Amici* is informed that several other organizations including the *Charles Hamilton Houston Institute*, and the *National Association of Criminal Defense Lawyers* intend to file separate amicus briefs in that case.

decision rule – is simply incorrect, for at least two reasons.

First: Since *Apodaca* was handed down, nearly four decades of empirical research on jury decision-making has demonstrated that unanimous juries are more careful, more thorough, and more reliable, returning verdicts that are more aligned with what experienced observers of the criminal justice system view to be the correct verdict. Louisiana's experiment with non-unanimous juries has resulted in a significant number of known wrongful convictions, and continues to allow an untold number of injustices.

Second: Recent scholarship shows that one of the original purposes of non-unanimous jury schemes was to silence minority voices, and suggests that those schemes do exactly what they were intended to do. Louisiana's non-unanimous jury provision was born of an explicitly racist desire to cleanse the criminal justice system of African-American influence. The Louisiana experience shows that the non-unanimous jury scheme actually does serve to aid in the exclusion of minorities from juries – not least because non-unanimous juries allow prosecutors to better conceal the racial use of peremptory strikes – and contributes to silencing the voices of minorities on juries. Eliminating the traditional unanimity requirement marginalizes the viewpoints of

dissenting jurors because jurors in the majority refuse to deliberate further once the threshold has been reached. This effect can be particularly troubling when those holding minority viewpoints are historic victims of discrimination, including women, people of color and religious minorities.

REASONS FOR GRANTING THE WRIT

Since this Court denied certiorari in *Lee v. Louisiana*, 07-1523 (2008) (raising the problem of Louisiana's non-unanimous jury scheme) there have been two significant and relevant developments in the case-law, both of which militate in favor of granting certiorari to revisit, and reverse, *Apodaca*. First, this Court's decision in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) strongly suggests that the "watered down" incorporation embraced by Justice Powell's dispositive solo opinion in *Apodaca* flies in the face of the constitutional tradition embodied in an otherwise-unbroken chain of this Court's opinions. *Id.* at 3035 (embracing the rule that "incorporated Bill of Rights protections 'are all to be enforced against the States under the *Fourteenth Amendment* according to the same standards that protect those personal rights against federal encroachment.'") (citation omitted).

Second, it has become clear that only intervention by this Court will resolve the logjam of lower court cases raising non-unanimous jury claims.[4] In *State v. Bertrand*, 2008-2214, 2008-

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[4] *See State v. Lawrence*, 2009-1637, p. 18 (La.App. 4 Cir. 08/25/2010); 2010 La. App. LEXIS 1188 at * 22 (rejecting appellant's challenge to his conviction at the hands of a non-unanimous jury) ("Suffice it to say that intermediate appellate

2311 (La. 3/17/09); 6 So.3d 738, the Louisiana Supreme Court ruled that Article 782 of the Louisiana Code of Criminal Procedure, which permits non-unanimous verdicts in certain felony cases, remains constitutional pending further action by this Court. The Louisiana Supreme Court identified *Apodaca* as controlling precedent, and emphasized that the task of reconsidering that decision rests with this Court: "[W]e are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that non-unanimous 12 person jury verdicts are

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judges, just like a trial judge, are not at liberty to ignore the controlling jurisprudence of superior courts") (internal quotation omitted); *State v. Every*, 2009-0721 (La.App. 4 Cir. 03/24/10); 35 So. 3d 410 (citing to *Bertrand* in rejecting non-unanimity challenge to non-unanimous verdict); *State v. Jones*, 2009-2261 (La.App. 1 Cir. 05/07/10); 39 So. 3d 849 (same); *State v. Moody*, 2009-1394 (La.App. 4 Cir. 04/21/10); 38 So. 3d 451 (same); *State v. Green*, 2010-0008 (La.App. 4 Cir. 11/17/10); 2010 La. App. LEXIS 1593 (same); *State v. Samuels*, 2010-0821 (La.App. 1 Cir. 10/29/10); 2010 La. App. Unpub. LEXIS 584 (same); *State v. Boudreaux*, 2008-1504 (La.App. 4 Cir. 09/29/10); 2010 La. App. LEXIS 1314 (same); *State v. Blanchard*, 2010-0014 (La.App. 1 Cir. 07/08/10); 41 So. 3d 662 (same); *State v. Martin*, 2009-1368 (La.App. 1 Cir. 10/23/09); 25 So. 3d 250 (same); *State v. Taylor*, 2009-0041 (La.App. 4 Cir. 09/04/09); 21 So. 3d 421 (same); *State v. Smith*, 09-100 (La.App. 5 Cir. 08/25/09); 20 So. 3d 501 (same); *State v. Raymond*, 08-1204 (La.App. 5 Cir. 04/28/09); 13 So. 3d 577 (same).

constitutional may someday be overturned...." 08-2214, p. 8; 6 So.3d at 743.

Following *Bertrand*, Louisiana's appellate courts have repeatedly declined to subject Louisiana's non-unanimous jury scheme to renewed scrutiny, despite mounting evidence that *Apodaca*'s foundational assumptions were flawed, and despite the emergence of a troubling historical record showing that Louisiana's non-unanimous jury scheme was born of a post-reconstruction desire to keep African-Americans out of the jury box.[5] *See, e.g.*, *State v. Thomas*, 10-220, pp. 12-13 (La.App. 5 Cir. 11/09/10); 2010 La. App. LEXIS 1549 at* 18

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[5] Nevertheless, some Louisiana judges have evidently chafed at their inability to consider arguments and evidence that were not set before this Court in *Apodaca*. *See State v. Williams*, 2009-0602 (La.App. 4 Cir. 01/27/10); 26 So. 3d 321 (Belsome, J., concurring in a judgment that denied, inter alia, appellant's non-unanimous jury claim) ("I write separately to comment regarding the historical significance of unanimous jury verdicts. Historically, a defendant could not be convicted unless the jury verdict was unanimous.... Therefore, until a further directive is given by the U.S. Supreme Court or the Louisiana Supreme Court, we are bound to follow *State v. Bertrand*...."); *State v. Barbour*, 2009-1258, p. 17 (La.App. 4 Cir. 03/24/10); 35 So. 3d 1142, 1152 (Belsome, J., concurring in an affirmation of a conviction stemming from a non-unanimous verdict) ("I write separately to acknowledge that historically, a defendant could not be convicted unless the jury verdict was unanimous.").

(rejecting non-unanimous jury claim) ("The trial court did not err in denying relator's motion to quash, since a trial judge is not at liberty to ignore the controlling jurisprudence of superior courts. *See Bertrand, supra.* Similarly, as an intermediate appellate court, this Court is obliged to follow the precedent established by the Louisiana Supreme Court.").[6] Further developments in Louisiana are unlikely absent action by this Court.

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[6] Some of the non-unanimous jury claims presented to, and rejected by, Louisiana's appellate courts in the past two years have arisen in postures that point up some of the constitutionally troubling aspects of the non-unanimous jury. *See, e.g., State v. McKnight,* 09-1186, p.6 (La.App. 4 Cir. 04/14/10); 37 So. 3d 1050, 1053 (reversing conviction handed down by non-unanimous jury for evidentiary insufficiency, and thus pretermitting discussion of appellant's non-unanimous jury claim) ("Defendant argues that his conviction by a non-unanimous jury is unconstitutional, in violation of the Sixth Amendment of the U.S. Constitution. Because we have reversed his conviction and sentence on other grounds, we pretermit discussion of this issue. We note, though, that this issue was recently addressed by this court and found to be without merit."); *State v. Jones,* 2009-0751 (La.App. 1 Cir. 10/23/09); 29 So. 3d 533 (reversing conviction of African-American defendant after 11-1 verdict of guilt, handed down by all-white jury, where trial court failed to investigate allegation that juror had been using racial slurs in jury room, but nevertheless considering – and discounting – appellant's non-unanimous jury claim); *State v. Blow,* 45,415, p. 29 (La.App. 2 Cir. 08/11/10); 2010 La. App. LEXIS 1148 at *44 ("Mrs. Blow somehow conjures up a structural defect here, in

This Court should take action in conjunction with the petitioner's application in *Barbour v. Louisiana,* (10-689) (response due December 27, 2010). As this Court acknowledged in *McDonald*, *Apodaca* is a jurisprudential anomaly: its holding is foreign to the Framers' understanding of the jury trial; it represent a solitary and unjustifiable exception to the rule that an incorporated right carries the same protections against state action as against federal action; it functions to the detriment of careful deliberation and reliable results; and its operation muzzles disenfranchised and marginalized communities.

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that the jury reached a 10-2 verdict in less than two hours. She views this split verdict and its alacrity as reflecting less than ample consideration of the case.").

I. BOTH THE EXPERIENCE OF LOUISIANA PRACTITIONERS AND THIRTY-FIVE YEARS OF EMPIRICAL RESEARCH CAST GRAVE DOUBT ON THE *APODACA* COURT'S ASSUMPTION THAT THERE IS NO SIGNIFICANT DIFFERENCE BETWEEN THE DELIBERATIVE PROCESS AND THE SUBSTANTIVE RESULTS IN UNANIMOUS AND NON-UNANIMOUS JURIES

A. Empirical Research Has Shown that Unanimous Juries Are More Thorough, Deliberate More Carefully, and Arrive at More Reliable Results than Non-unanimous Juries

With admittedly little empirical or evidentiary support other than its own hunches and assumptions, the majority in *Johnson v. Louisiana*, 406 U.S. 356, 360-61 (1972), rejected any notion that upon reaching the quorum necessary to convict, the majority jurors might simply short-circuit deliberations and ignore the reasonable doubts of their colleagues. The *Johnson* Court concluded that before it would alter its own perceptions of jury behavior and overturn a legislative judgment that unanimity is not essential to reasoned jury verdicts, "we must have some basis for doing so other than unsupported

assumptions." *Id.* at 361-62. *But see id.* at 389-90 (Douglas, J., dissenting) ("I fail to understand why the Court should lift from the States the burden of justifying so radical a departure from an accepted and applauded tradition and instead demand that these defendants document with empirical evidence what has always been thought to be too obvious for further study.").

But subsequent empirical research on jury decision-making has consistently undermined the view that non-unanimous juries can protect the jury trial guarantee. The lack of a unanimity requirement negatively affects a jury's deliberative process and the accuracy of its fact findings.

Empirical evidence shows unanimous juries are more thorough and careful than non-unanimous juries. Mock juries required to reach unanimity deliberated more thoroughly and discussed the evidence as opposed to focusing unduly on taking votes to reach the quorum. *See* Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury* 108 (1983); James H. Davis, *et al., The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. Personality & soc. Psychol. 1 (1975) (simulated juries deliberated longer when they were required to reach a unanimous verdict as opposed to when they had to reach a two-thirds vote); Richard A. Primus, *When*

Democracy is Not Self-Government: Toward a Defense of the Unanimity rule for Criminal Juries, 18 Cardozo L. Rev. 1417, 1445 (1997) (arguing that the unanimity rule "forces decision makers to continue their discussions past the point where a less stringent decision rule would permit the process to end."). In contrast, studies have found that "shorter deliberations lead to less accurate judgments....[M]ajority rule discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable." Kim Taylor-Thompson, *Empty votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1273 (2000).

Not only do unanimous jurors deliberate longer and more thoroughly, but they are less likely to silence and marginalize minority views and dissenting jurors. *See* Valerie P. Hans, *The Power of the Twelve: The Impact of Jury size and Unanimity on Civil Jury Decision Making*, 4 Del. L. Rev. 2, (2001) (when unanimity was not required, dissenting jurors on mock juries participated less and were viewed by majority jurors as less persuasive); Shari Diamond, *et al., Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201 (2006) (when real juries were told that they need not reach unanimity, they were less concerned about deliberations, refused to consider the merits of the minority view, were more likely to hold a

formal vote count within ten minutes of the beginning of deliberations and continued to vote often until they reached the required majority vote for a verdict).

Finally, unanimity rules can actually shape a jury's verdict. Studies have shown how verdicts supported by a majority of the jurors at the start of deliberations were different than the verdicts actually reached after a careful, thorough deliberative process. *See* Hastie, *et al.*, *supra,* at 96-98; Valerie P. Hans *et al.*, *The Hung Jury: The American Jury's Insights and Contemporary Understanding,* 39 Crim. L. Bull. 33, 47 (2003) (finding that the defendant was ultimately acquitted 12 percent of the time in a sample of cases where the first ballot revealed a strong majority in favor of conviction).

Jurors operating under a unanimity rule report being more satisfied with their deliberations and more confident that they reached the correct result, while non-unanimous juries report lower ratings of the performance and decision processes of the other jurors. Hastie *et al.*, *supra*, at 76, 82; Diamond, *et al.*, *supra*, at 205. Perhaps most importantly, unanimity rules enhance the perceived reliability and legitimacy of criminal verdicts. *Id.* at 222, 227 (citing research indicating that "community residents viewed unanimous procedures for arriving at jury verdicts in criminal

cases as more accurate and fairer than majority procedures").

B. Louisiana's Experience Has Shown that Non-unanimous Juries Present an Unacceptable Risk of Rushed and Unreliable Decision-Making

The number of individuals in Louisiana who have been exonerated after having been found guilty by a non-unanimous jury lends support to the empirical studies suggesting that non-unanimous verdicts exacerbate the risk of wrongful convictions. A study by the Innocence Project of New Orleans (IPNO) shows that 52.9% of their clients who were wrongfully convicted and incarcerated for a non-capital offense were convicted by a non-unanimous jury. IPNO has represented nine individuals in Louisiana who were wrongfully convicted and lost their liberty, family, and livelihood despite the fact that there were jurors on their respective juries with reasonable doubts as to their guilt.[7] If the

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[7] As to date, IPNO has identified 17 non-capital cases where the person was wrongfully convicted by a jury of 12 persons. Juries in eight of those non-capital cases returned a unanimous verdict whereas nine juries returned a non-unanimous verdict. IPNO has verified the unanimity/non-unanimity of the jury verdicts with the trial record in each of the 17 cases but for two, Ricky Johnson, case no. 30-770, Sabine Parish, and Willie Jackson, case no. 87-00205,

reasonable doubts of those jurors were not marginalized and silenced by the supermajority, these men may not have lost untoward number of years behind bars for crimes they did not commit:

Glenn Davis, 92-4541, Jefferson Parish
Larry Delmore, 92-4541, Jefferson Parish
Terence Meyers, 92-4541, Jefferson Parish
Gene Bibbins, 287-979, East Baton Rouge
Gerald Burge, 147-175, St. Tammany Parish
Doug Dilosa, 87-105, Jefferson Parish
Travis Hayes, 97-3780, Jefferson Parish
Rickey Johnson, 30-770, Sabine Parish
Willie Jackson, 87-00205, Jefferson Parish

While "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt," *In re Winship*, 397 U.S. 358, 363-64 (1970), men and women in Orleans Parish are regularly condemned to prison – at times for life without the possibility of probation or parole – when at least two people on their jury had grave doubts has to their guilt. Since January 1, 2010, public defenders at the Orleans Public Defenders have tried 69 serious felony trials requiring the empanelling of a 12-

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Jefferson Parish. The information as to the non-unanimity of the jury verdict for these two cases is from their clients.

person jury. Of those 69 trials, 51 returned a verdict of guilty on at least one count or more. Sixteen juries returned a unanimous verdict of guilty whereas thirty-two[8] juries returned a non-unanimous verdict of guilty.[9] In other words, nearly two thirds of the guilty verdicts were returned by

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[8] The jury was not polled in one case, *State v. Joseph Hayes*, 490-682, where the jury returned a responsive verdict of guilt, and OPD does not have jury verdict information in two cases, *State v. Gerard Tillman*, 484-033, and *State v. Darius Adams*, 458-193.

[9] This information has been gathered by OPD from its public defenders. Non-unanimous verdicts from January 1, 2010 to November 26, 2010 are as follows:: *State v. Jamaal Tucker*, 482-303; *State v. Darryl Robinson*, 489-040; *State v. Jimil Joyner*, 468-443, *State v. Kaleigh Smith*, 475-055; *State v. David Bonds*, 478-742; *State v. Kenneth Braud*, 480-782, State *v. Ortiz Jackson*, 482-029; *State v. Cleveland Moore*, 483-891; *State v. Jimmy Warner*, 484-126; *State v. Brandon Ruffin*, 486-244; *State v. Dale Maes*, 486-334; *State v. Dexter Montgomery*, 487-738; *State v. Gregory Vincent*, 488-188; *State v. Tautus Smith*, 488-202; *State v. Terrell Holmes*, 488-362; *State v. Wilford Roberts*, 488-741; *State v. James Davis*, 489-600; *State v. George Lennis*, 490-269; *State v. Richmond Smith*, 491-314, State *v. Clifford Pierce*, 491-393; *State v. Corey Kelly*, 491-474; *State v. Ronnie Rollins*, 491-630; *State v. Kerry Cureaux*, 492-369; *State v. Leroy Jackson*, 492-704; *State v. Marcus Jackson*, 492-950; *State v. Wayne Wilson*, 493-006; *State v. Bruce Sims*, 493-278; *State v. Toliver Johnson*, 493-694; *State v. Robert Hart*, 493-808; *State v. Leonard Nellum*, 493-936; *State v. Verchaun Simms*, 494-239; *State v. Charles Harris*, 496-276.

non-unanimous juries. Simply put, on a regular basis men and women in Orleans Parish are being deprived of their liberty "when doubts of a single juror [is] evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt." *Apodaca*, 406 U.S. at 403 (Brennan, J., dissenting).

Such a high percentage of juries returning non-unanimous verdicts likely means that these juries ceased deliberations when the required quorum of ten was reached. Focusing on reaching a statutorily mandated verdict as opposed to carefully and thoughtfully sifting through all of the evidence results in truncated deliberations leading to erroneous or highly questionable verdicts.

II. LOUISIANA'S NON-UNANIMOUS JURIES, WHICH EMERGE FROM A TROUBLINGLY RACIST HISTORY, CONTINUE TO HAVE THE EFFECT OF EXCLUDING, MARGINALIZING, AND SILENCING THE VOICES OF RACIAL AND ETHNIC MINORITIES AND WOMEN

Louisiana's majority verdict system was first introduced in the state's 1898 Constitution, as part

of a raft of measures specifically designed to "establish the supremacy of the white race."[10] Most of those measures have since been abandoned or struck down. However, the majority verdict system continues to undermine the participation of African Americans and other minorities in the criminal justice system and to tarnish the legitimacy of jury verdicts.

The pernicious effect of non-unanimous jury verdicts amplifies and is itself exacerbated by the racially-discriminatory use of peremptory challenges. In Louisiana and Oregon, prosecutors can mask discriminatory intent by accepting one or two minority jurors in the knowledge that minority votes can be marginalized by the majority verdict scheme. Discriminatory use of peremptory challenges can more easily ensure that minority jurors are effectively silenced in a jurisdiction where prosecutors need only ten votes to convict. As the drafters of Louisiana's racist 1898 Constitution were no doubt aware, where a group

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[10] From its creation, the state of Louisiana provided for the common law right to trial by jury, including unanimity in jury verdicts. By the Act of 1805, the Territory of Orleans adopted the forms and procedures of the common law of England in its criminal proceedings, including "the method of trials." Act of 1805, § 33. *See generally* A. Voorhies, *A Treatise on the Criminal Jurisprudence of Louisiana*, Bloomfield & Steel (1860), pp.3-10.

forming a majority in the community can elect the District Attorney and the judge and then form a majority quorum on the jury, the jury no longer operates effectively as a check on state power and a guarantor of the rights of minorities.

A. Louisiana's Majority Verdict System Was Introduced in 1898 by a Constitution Explicitly Designed to Disenfranchise and Silence the African-American Population

Louisiana's 1898 Constitution, like the Alabama Constitution of 1901 examined by this Court in *Hunter v. Underwood*, 471 U.S. 222 (1985), "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 229.

It was this 1898 Convention that for the first time broke with the Common Law tradition and encoded a rule allowing verdicts by a 9-3 majority. At the same time, the Convention further eroded the jury trial guarantee by eliminating misdemeanor juries and reducing jury sizes for lesser felonies. The proponents of those rules sometimes tried to pass them off as cost-saving devices, but commentators have directly linked the diminution of the jury trial right to the Convention's larger effort "to consolidate Democratic power in the hands of the 'right people,'

thereby bypassing the poorer sorts, just as the suffrage provision did." W. Billings & E. Haas, *In Search of Fundamental Law: Louisiana's Constitutions*, 1812-1874, The Center for Louisiana Studies (1993), pp. 93-109.

The opening address at the 1898 Louisiana Constitutional Convention made clear that the point was to limit African-American participation in the democratic process and to "perpetuate the supremacy of the Anglo-Saxon race in Louisiana." Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, 8-9 (1898) [hereinafter "Journal"]. Closing the Convention, Hon. Thomas J. Semmes celebrated the putatively successful "mission" of the delegates "to establish the supremacy of the white race in this state." *Id.* at 374.

As noted *supra*, this sordid history is laid out in greater detail, and brought up to date, in briefing filed by *amicus* LACDL in *Lee v. Louisiana* and *Bowen v. Oregon*. The issue is squarely presented in the petition for certiorari in *Barbour v. Louisiana* (10-689), now before this Court. Suffice it to say, for these purposes, that Louisiana's provision for majority verdicts appears to have originally been motivated by an explicitly racist desire to dis-empower African-Americans. And, as discussed *infra*, the non-unanimous jury scheme continues to have the effect of silencing and

marginalizing African-American and other minority voices.

B. Non-unanimous Jury Schemes Silence and Marginalize the Voices of African-Americans, Other Racial and Ethnic Minorities, and Women

The system of majority verdicts in Louisiana creates the inherent risk that the voices of African-American jurors will not be respected, will not form a meaningful part of the deliberations, and may even be completely ignored. Majority verdicts create an opportunity for other jurors to return the verdict of their choosing while ignoring or discounting the views of minority jurors. This dilution of meaningful African-American participation on juries is exponentially worsened when combined with the discriminatory use of peremptory challenges by prosecutors.

As the delegates at the 1898 Louisiana Constitutional Convention understood, discriminatory intent can be masked by accepting one or two African-American jurors in the knowledge that their vote will not be fully effective in a system of majority verdicts. At the time it passed the nonunanimity rule, the 1898 Convention had before it the "Statement of Registered Voters 1897 and 1898" which is contained in the Official Journal itself. *See*

Journal, supra, at inserted chart. The "Statement" showed that African-Americans represented 14.7% of all citizens registered to vote in Louisiana as of January 1, 1898 (12,902 of 87,240). *Id.* Proportionate representation on juries would have seen an average of two black jurors per trial. The selection of nine votes for a verdict served to guarantee white majority control over jury verdicts – black jurors could be ignored.

Within a system of majority verdicts it becomes easier to conceal discriminatory intent in the use of peremptory challenges. At the same time, a majority verdict system makes the impact of race-based peremptory challenges more dramatic. Where a prosecutor minded to discriminate knows that he or she need only secure ten out of twelve votes to obtain a conviction, there is an opportunity to include one or two token African-American jurors. This strategy was even observed by the Louisiana Supreme Court in the case of a particularly obvious *Batson* violation:

> Because only ten votes were needed to convict defendant of armed robbery, the prosecutor could have assumed, contrary to *Batson*'s admonition that it was unacceptable to do so, that all black jurors would vote on the basis of racial bias and then purposefully discriminated by limiting the number of blacks on the jury to two. . .

> This pattern of striking all black jurors (except two) continued in the face of mounting pressure by the trial court to select a jury more representative of the black population of the parish.

State v. Collier, 553 So. 2d 815, 819-20 & 823 (La. 1989) (footnotes omitted). *See also State v. Cheatteam*, 07-272, p. 10 (La.App. 5 Cir. 05/27/08); 986 So. 2d 738, 745 ("[Defense counsel] pointed out that it appeared the prosecutor was attempting to ensure that only two African-Americans would serve on the jury. And in order to convict, the prosecutor needed only 10 votes.").[11]

The concern over the negative feedback-loop between non-unanimous verdicts and discriminatory use of peremptory strikes in Louisiana is not merely academic. In a large scale study of the pattern of prosecution peremptory challenges in Louisiana's Jefferson Parish – which today makes up the largest judicial district in the state – it has been shown that prosecutors

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[11] The potential for de facto silencing of minority viewpoints is not limited to Louisiana. Because white/non-Hispanic citizens comprise 80.5% of Oregon's population, the average jury will consist of two or fewer minority jurors. Thus, under a 10-2 decision rule, the voices of ethnic and racial minority jurors can be safely ignored.

peremptorily challenged African Americans at more than three times the rate at which they challenged non-African Americans.[12]

In 2003, Professor Joel Devine, of Tulane University's Center for Applied Science Research, analyzed data gathered from 390 trials involving over 10,000 prospective jurors in Jefferson Parish. Professor Devine's analysis showed that prosecutors used peremptory strikes to remove 55% of otherwise-eligible African-American prospective jurors, but only 16% of non-African American jurors in the same position. *Id.*

Researchers then analyzed the actual representation of African-Americans on Jefferson Parish juries, using the same dataset. Using a statistical tool known as a Poisson Distribution, researchers estimated the expected distribution of African-Americans on juries in a jurisdiction that is 23% African American, if the results were not racially skewed[13]:

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[12] *Blackstrikes, A Study of the Racially Disparate Use of Peremptory Challenges By the Jefferson Parish District Attorney's Office*, A Report of the Louisiana Crisis Assistance Center, (Sept. 2003), available at www.blackstrikes.com (last visited November 28, 2010).

[13] The 2000 U.S. Census recorded the African-American population at 22.9% of the Parish. Profile of General

# of African-Americans on Jury	What It Should Be	What It Is
0	6%	22%
1	17%	35%
2	24%	23%
3	22%	12%
4	15%	6%
5	8%	1%
6	4%	1%

These results suggest that as a result of the extensive use of prosecution peremptory challenges against African-Americans, the number of all white juries was more than three times what might have been expected in a jurisdiction composed of 23% African-Americans. And, where in race-neutral process 47% of juries might have been expected to have two or fewer African-Americans, fully 80% Jefferson Parish juries actually had two or fewer African-Americans – that is, so few African-Americans that their voices could effectively be discounted by the white majority.

Demographic Characteristics 2000, U. S. Census Bureau, available at http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&qr_name=DEC_2000_SF1_U_DP1&ds_name=DEC_2000_SF1_U&geo_id=05000US22051 (last visited 11/28/10).

The combined effect of racially disparate use of prosecution peremptory strikes and majority verdicts is dramatic. In a system of unanimous verdicts and even handed use of peremptories, there should be only 6% of juries in Jefferson Parish in which there is no guaranteed African-American voice; that is, those cases where an all-white jury is empanelled. However, given the reality of jury selection methods and the use of majority verdicts, fully 80% of juries in Jefferson Parish have no guaranteed African-American voice.

Justice Potter Stewart warned that *Apodaca*'s rule might give rise to just such a situation, in which "[ten] jurors can simply ignore the views of their fellow panel members of a different race or class." *Johnson*, 406 U.S. at 397 (Stewart, J., dissenting); Dennis J. Devine et al., *Jury Decision making: 45 Years of Empirical Research on Deliberating Groups, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001)* ("Unanimous verdicts protect jury representative-ness - each point of view must be considered and all jurors persuaded."); *id.* ("minority jurors participate more actively when decisions must be unanimous."). *Amicus* is not suggesting that all juries split on racial lines or all jurors refuse to listen to or share the views of those of other races. However, these figures dramatically illustrate the inherent potential of a system of majority verdicts to undermine the benefits of full participation and legitimacy offered by unanimous

verdicts, particularly when combined with a widespread abuse of peremptory challenges.[14]

The plurality in *Apodaca* was unwilling to accept that members of a minority group may be inappropriately silenced or disproportionately excluded in deliberations directed towards a majority verdict, rather than unanimity. But here, too, it appears that facts on the ground have thrown into doubt the premises on which *Apodaca*'s plurality based its decision. This Court has made significant efforts in recent years to ensure that jurors are not excluded from jury participation on the basis of their race or gender. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994); *Miller-El v. Dretke*,

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[14] It must be noted, too, that even if minorities hold more than two spots on any given jury, minority race and female gender are negatively correlated with juror persuasiveness and deliberation performance. *See* Hastie et al., *supra*, at 149 (finding that to the extent the juror has characteristics or experiences that are negatively linked to deliberation performance and juror persuasiveness, the more likely the juror is to be a holdout). *See also* Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1261, 1298-99 (Apr. 2000) (citing studies observing that women speak less than do men during deliberations, and that men often interrupted the women and ignored their arguments). This means that even when minorities sit on a jury, there is an increased likelihood that women and people of color may end up being outvoted by the majority of a non-unanimous jury.

544 U.S. 660 (2005); *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008). But the important constitutional principles embodied in those cases are undermined when the views of women and people of color are marginalized by non-unanimous juries. The jury trial right found in the Sixth Amendment is designed to protect the individual from the oppression by the government. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). Where a majority population can elect prosecutors and judges and then form a veto-proof quorum on a jury, the jury no longer functions as the "circuit-breaker in the State's machinery of justice." *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

CONCLUSION

Non-unanimous criminal verdicts in Oregon and Louisiana continue to undermine a critical portion of the Sixth Amendment's jury trial guarantee. *Amici* respectfully suggest that this Court consider this case along with the *petition for certiorari* now before the Court and filed in *Barbour v. Louisiana* (10-689), to grant certiorari, and reverse *Apodaca* with the benefit of full briefing on the Fourteenth Amendment issues raised by the troubling racist history behind Louisiana's non-unanimous jury scheme.

RESPECTFULLY SUBMITTED

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